Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
No.: 03-479

IN RE: THOMAS A. DIONISIO, DEBTOR

THOMAS A. DIONISIO, Petitioner

v.

U.S. TRUSTEE'S OFFICE; VISION PROPERTIES OF FAIRLAWN I, LLC; JAMES A. SCARPONE, CHAPTER 11 TRUSTEE; VICTOR FISCHETTI, Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(3 Cir. No.: 02-3020)
Circuit Court Judges: Alito, Fuentes and Greenberg

BRIEF OF RESPONDENT VISION PROPERTIES OF FAIRLAWN I, LLC IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. The only question properly presentable for review by the Supreme Court concerns whether the Court of Appeals properly determined that the Petitioner lacked standing to appeal the Bankruptcy Court's decision in this matter, since standing was the only basis on which the Court of Appeals ruled, and the Court of Appeals did not review the merits of the Bankruptcy Court's decision.

LIST OF PARTIES

The Petitioner's list of parties is acceptable. A corporate disclosure statement for Respondent Vision Properties of Fairlawn I, LLC was included with its Brief in opposition to the appeal submitted to the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

The Debtor/Petitioner, Thomas A. Dionisio (the "Debtor") has misstated the underlying facts and law in numerous respects. The correct recitation of the facts and applicable law follows.

A. Transactions and Litigation Regarding the Masterlease and the Premises

Respondent Vision Properties of Fairlawn I, LLC ("Vision") is the Debtor's landlord of nonresidential real property located at 21-21 Broadway, Fairlawn, New Jersey (the "21-21 Property"). In or around October, 1983, the Debtor entered into the Masterlease for 14,487 square feet of a 55,000 square foot building located at the 21-21 Property (the "Premises"). At the time the Masterlease was entered into, the landlord was a limited liability partnership known as 21-21 Broadway Associates, in which the Debtor had a 25% partnership interest.

On or about January 1, 1984, the Debtor entered into a Sublease (the "Sublease") leasing to Artistic Academy 6,112 square feet of the original 14,487 square feet that the Debtor had leased under the Masterlease for the Premises. The subleased portion of the leased premises was on the second floor of the 21-21 Property. The term of the Sublease ran from January 1, 1984 through December 31, 1988 with three, 5-year renewal options.

Artistic Academy is an entity which operates a State-licensed cosmetology school. At the time the Sublease was entered into, Artistic Academy was owned by Carmen DePasquale ("DePasquale") and the Debtor. Thereafter, in or about 1986, the Debtor sold his interest in Artistic Academy to DePasquale who then became the owner and sole shareholder of Artistic Academy. DePasquale and the Debtor subsequently negotiated several amendments to the Sublease.

In or around September, 1997, DePasquale formed the entity known as Vision Properties of Fair Lawn I, LLC for the purpose of purchasing the Premises from 21-21 Broadway Associates. Vision is a limited liability company whose only members are Carmen DePasquale, his wife and his children. In consideration for the purchase of all the right, title and interest in the Premises, Vision agreed to pay a total purchase price of $2,707,500 over ten (10) years payable as follows: to Columbia Savings Bank, the first mortgagee, $1,784,908.20 in monthly installments of principal and interest, and $922,591.80 to 21-21 Broadway Associates in monthly payments for ten years of $11,812.19 per month. Since the Debtor owned 25% of 21-21 Broadway Associates, the Debtor's 25% income stream from the installment sale is listed as a monthly income stream to the Debtor on his Schedule of Personal Property. In connection with its purchase, Vision became the assignee of the Masterlease between 21-21 Broadway Associates and the Debtor. Thus, Vision became the Debtor's landlord for the Premises and the Debtor remained the sub-landlord to Artistic Academy, as sub-tenant. Vision's status as the Debtor's landlord was confirmed in a written notice to the Debtor dated September 4, 1997.

In approximately 1999, the Debtor commenced litigation seeking to evict Artistic Academy from the sub-leased space on the second floor of the Premises. That entire action was premised on Appellant's contention that he was the tenant for the Premises under the Masterlease and consequently had a right to evict the subtenant.

As a result of a settlement of the 1999 litigation, an agreement was executed whereby Debtor, as Tenant under the Masterlease, and Vision, as Landlord under the Masterlease, agreed to modify the Masterlease through Debtor's surrender to Vision of his interest in the 8,787 square feet of sub-leased space, leaving him with 5700 square feet of the original leased space in consideration of a payment to Debtor of $400,000.

B. The Bankruptcy Proceedings and Appeals

On November 22, 2000, (the "Petition Date") the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On December 18, 2000, the Debtor filed his Schedules of Assets and Liabilities reflecting his tenancy under the Masterlease. On or about March 26, 2001, the Debtor filed his Disclosure Statement further acknowledging his tenancy under the Masterlease.

Despite Debtor's knowledge of the Masterlease with Vision, as more fully set forth hereinafter, the Debtor failed to move to elect to assume or reject the Masterlease or request an extension of time for cause to determine whether to assume or reject the Masterlease within the sixty day period immediately following the Petition Date. After the sixty day period had expired, on March 27, 2001, a Chapter 11 Trustee was appointed by the Bankruptcy Court.

The Debtor's Bankruptcy Petition and associated Schedules did not provide Vision with formal notice of the Debtor's filing. The Executory Contracts Schedule did not list any lease with Vision. In addition, the Debtor did not list Vision as a creditor on the Schedule of Creditors or the Creditor Matrix. Vision did not receive formal notice of the Debtor's bankruptcy filing until on or about May 30, 2001, when the Chapter 11 Trustee transmitted a rental payment to Vision.

Vision did not accept the rental payment transmitted by the Trustee on May 30, 2001. Instead, on June 12, 2001, Vision filed a motion returnable July 2, 2001, for an order directing the Debtor to surrender the leased nonresidential real property described in the Masterlease to Vision, the Debtor's landlord. In response to Vision's motion, the Debtor's Chapter 11 Trustee advised the court that he saw no reasonable basis upon which he could oppose Vision's motion, because the facts seemed indisputable that the Debtor had allowed the time period for affirming or rejecting

the Masterlease to expire without taking action as required by Section 365(d)(4).

After hearing the arguments of counsel on July 2, 2001, and in an effort to afford the Debtor an opportunity to give the Bankruptcy Court good cause not to deem the lease rejected, the Bankruptcy Court directed Vision and the Debtor to file supplemental pleadings by July 13, 2001, for an adjourned hearing to be held on July 17, 2001. Both Vision and the Debtor filed supplemental certifications and briefs and the Debtor also filed, as part of his supplemental pleadings, a "contingent cross-motion" to convert his Chapter 11 case to Chapter 7. On July 17, 2001, the Bankruptcy Court conducted a hearing and reserved decision. Thereafter, the Chapter 11 Trustee of the Debtor filed an application in support of the Debtor's motion for conversion of the case to Chapter 7. The Bankruptcy Court rendered its decision on both pending motions at a hearing on August 17, 2001, granting Vision's motion for an Order directing the Debtor and the Trustee to surrender the leased nonresidential property and granting the Debtor's cross-motion to convert the case from Chapter 11 to Chapter 7.

On September 28, 2001, the Debtor filed a motion in the District Court seeking a stay pending appeal of, *inter alia*: a) the Bankruptcy Court's Order directing the Debtor and the Trustee to surrender the leased premises to Vision, and b) the Order authorizing the conversion of the case from Chapter 11 to Chapter 7. On December 10, 2001, the District Court entered an Order denying Debtor's motion for a stay pending appeal.

On October 19, 2001, the Debtor appealed to the District Court the Bankruptcy Court's September 5, 2001 Order reflecting the Bankruptcy Court's August 28, 2001 decisions. Contrary to the Debtor's assertions in his Petition for Certiorari, Vision raised the Debtor's lack of standing in Vision's brief in opposition to the Debtor's appeal. On June 28, 2002, the District Court issued its Memorandum and Order dismissing the Debtor's appeal on the merits.

On July 19, 2002, Debtor filed its Notice of Appeal of the District Court's decision. The Debtor did not appeal to the Third Circuit the conversion of his bankruptcy case from Chapter 11 to Chapter 7.

By letter dated March 25, 2003, the Clerk of the Third Circuit directed the Debtor to submit a letter brief addressing only the issue of the Debtor's standing to pursue the appeal. In response, by letter brief dated March 28, 2003, the Debtor raised standing issues, similar to those asserted in his brief to this Court, that were limited to cases under Chapter 11 of the Bankruptcy Code and that had no bearing on a case under Chapter 7 such as the one at bar.

On April 17, 2003, the Court of Appeals for the Third Circuit delivered its opinion and order vacating the District Court's decision and remanding the case to the District Court for entry of an order dismissing the Debtor's appeal for lack of standing. The Third Circuit did not address the merits of the appeal. (See April 17 Opinion, page 5.)

C. Debtor's Knowledge of the Masterlease and His Status as the Tenant Thereunder

The May 26, 1999 written agreement executed by the Debtor, as part of the settlement of his litigation to evict Artistic Academy from the sub-leased space on the second floor of the Premises, expressly identified Debtor as the Tenant under the Masterlease and further identified Vision as the Landlord under the Masterlease. That agreement, which resulted in a payment to the Debtor of $400,000 in exchange for his surrender to Vision of his interest in a portion of the Premises, was executed by the Debtor only 1 ½ years prior to his bankruptcy filing.

The Debtor's Bankruptcy Schedules filed on December 18, 2000 -- well within the initial 60 day period of the Petition Date -- also clearly reflect the Debtor's awareness of his personal interest in the Premises. On his

Schedule A - Real Property, the Debtor expressly identified his interest as tenant under the Masterlease for 6000 square feet at 21-21 Broadway. On his Schedule B - Personal Property, the Debtor listed his 25% interest in 21-21 Broadway Associates.

On January 17, 2001, the Debtor filed a Complaint in the Bankruptcy Court (Adversary Proceeding Number 01-3031) against numerous parties, including his estranged wife, Laura Dionisio. In the Complaint, which was also filed within sixty days immediately following the Petition Date, the Debtor stated that "[he] is the owner of a Masterlease on 21-21 Broadway (location of salon) the owner of the building(s) being Vision Properties." In a separate paragraph, the Debtor went on to identify and explain his independent interest as a 25% limited partner in 21-21 Broadway Associates. "Debtor further has an interest . . . in the income stream from the installment sale proceeds received from the purchaser . . ." Thus, Debtor's Adversary Complaint plainly evinced his knowledge of the Masterlease with Vision and further acknowledged that the Masterlease and income stream from the installment sale were separate and distinct transactions.

In his Disclosure Statement filed in March 2001, the Debtor continued to acknowledge his personal interest in the Premises. In paragraph 25 of the Disclosure Statement, Debtor averred that he "is the owner of a Master Lease on 21-21 Broadway (location of salon) the owner of the building(s) being Vision Properties." Moreover, in paragraph 27 of the Disclosure Statement, Debtor asserted a separate interest in the Premises, stating that he "further has an interest (as former 25% limited partner in the title) in the income stream from the installment sale proceeds received from the purchaser..."

As made clear by the foregoing documents, the installment sale and the Masterlease are two entirely separate transactions between different parties. The installment sale was between 21-21 Broadway Associates and Vision, and the

Masterlease was between the Debtor and 21-21 Broadway Associates. The only affect the installment sale had on the Masterlease was to substitute Vision for 21-21 Broadway Associates as the landlord to the Debtor, and the Debtor clearly knew that he remained the tenant under the Masterlease.

ARGUMENT

The Court of Appeals Properly Ruled that the Debtor Lacked Standing to Appeal the Bankruptcy Court's Decision

The Court of Appeals for the Third Circuit rejected Debtor's appeal solely on the basis that the Debtor lacked standing to appeal the Bankruptcy Court's Decision. The court made clear in its decision that it was not reviewing the underlying merits of the matter. The Court of Appeals' consideration of the standing issue was correct.

Under Section 323 of the Bankruptcy Code, a trustee is the representative of a debtor's estate and has the capacity to sue and be sued. See 11 U.S.C. §323 and In re Eisen, 31 F.3d 1447, 1451 n.2 (9th Cir. 1994). In Eisen the court held that only the Chapter 7 trustee, and not the debtor, had standing to appeal bankruptcy court orders because "[o]nce appointed a trustee, the debtor's assets and claims pass to the trustee, making the trustee 'the proper party in interest, and the only party with standing to appeal the bankruptcy court's order.'" Id. See also Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A., 530 U.S. 1, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000) (rejecting a creditor's attempt to assert an administrative claim under Section 506(c) of the Bankruptcy Code in a Chapter 7 proceeding that was converted from a Chapter 11 proceeding, holding that only the bankruptcy trustee had the right to assert such a claim); Jones v. Harrell, 858 F.2d 667, 669 (11th Cir. 1998) ("A trustee in bankruptcy succeeds to all causes of action held by the debtor at the time

the bankruptcy petition is filed"); Detrick v. Panalpina, Inc. et al., 108 F.3d 529, 535 (4th Cir. 1997), cert. denied, 522 U.S. 810 (1997) (in general "in a Chapter 7 proceeding, the trustee alone has standing to raise issues before the bankruptcy court and to prosecute appeals").

The Debtor's bankruptcy case was converted from Chapter 11 to Chapter 7 on August 17, 2002. Since the Debtor did not appeal to the Court of Appeals the conversion of his case to Chapter 7, the Debtor had no standing to prosecute the appeal. Only the Chapter 7 Trustee had such standing, and the Trustee did not file any appeal of either the Bankruptcy Court or District Court's decision. Indeed, the Trustee took no position below on Vision's motion for surrender of the Premises; he advised the Bankruptcy Court that he believed there was no reasonable basis to oppose Vision's application because the facts seemed indisputable that the Debtor had allowed the time period for affirming or rejecting the Masterlease to expire without taking action as required by Section 365(d)(4). Accordingly, the Debtor's appeal was properly dismissed for lack of standing.

The cases relied upon by the Debtor are inapposite. In re: Marin Motor Oil, Inc., 689 F.2d 445 (3rd Cir. 1982), cert. denied, 459 U.S. 1206 (1983), simply stands for the proposition that in a Chapter 11 case a creditor's committee has an absolute right to intervene in an adversary proceeding commenced by a trustee. Similarly, In re: Cybergenics Corp., 330 F.3d 548 (3rd Cir. 2003), was a Chapter 11 case involving the narrow issue of a creditor committee's derivative standing to commence an adversary proceeding to avoid a fraudulent transfer of assets under Section 544(b) of the Bankruptcy Code. The court expressly distinguished the situation in Cybergenics from those arising under Chapter 7 of the Bankruptcy Code, such as an action under Section 506(c), pertaining to recovery of administrative expenses, in which only the Chapter 7 trustee had the right to pursue an action. 330 F.3d at 558, 560. Finally, In re: G-1 Holdings, Inc., 292 B.R. 804 (Bankr. D.N.J. 2003) also was expressly

limited to Chapter 11 cases, addressing the right of a legal representative to intervene, pursuant to the provisions of Section 1109 of the Bankruptcy Code, in an avoidance action under Section 544(b).

The Debtor's other arguments are similarly unavailing. Contrary to the Debtor's assertions, the standing issue was raised before the District Court; however, the District Court chose to dismiss the Debtor's appeal on the merits. The Debtor is not simply defending litigation; rather, he has invoked the jurisdiction of the District Court, the Court of Appeals and now this Court to actively prosecute appeals of judicial decisions. Only the Chapter 7 Trustee has standing to prosecute such appeals. Finally, the Debtor's reference to Bankruptcy Rule 6009 is misplaced, since Rule 6009 is in the disjunctive, allowing either the trustee or the debtor in possession, but not both, to prosecute or defend an action.

CONCLUSION

For the foregoing reasons, Respondent Vision Properties of Fairlawn I, LLC respectfully requests that the Debtor's Petition for a Writ of Certiorari be denied.

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Dated: August 7, 2003